Supreme Court, U.S.
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No. 82-772

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO "MEMORANDUM FOR FEDERAL RESPONDENTS AND BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION"

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (i)

ARGUMENTS:

The Issue Raised Before This Court Is Unrelated To The Past History Of The Proceeding 1

The Issue Raised Herein Results From The Confusion Created By Conflicting Decisions Of The Lower Courts 2

CONCLUSION 5

APPENDIX—Documentation Regarding Tenth Circuit Proceeding In Which The F.C.C. Requested Withdrawal Of Its Motion To Dismiss An Appeal For Lack Of Jurisdiction Under Section 402(a) Of The Communications Act Of 1934, As Amended 1a

TABLE OF AUTHORITIES

Cases:

Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) 3, 4

Mackey v. United States, 255 F.2d 898 (D.C. Cir. 1958) 4

Rhode Island Television Corporation v. FCC, 320 F.2d 762 (D.C. Cir. 1963) 4, 5

Statutes:

Communications Act of 1934, as amended (1976):

47 U.S.C. § 402 ..... 2, 3

47 U.S.C. § 402(a) 2, 3, 4

47 U.S.C. § 402(b) 2, 3, 4, 5

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REPLY

THE ISSUE RAISED BEFORE THIS COURT IS UNRELATED TO THE PAST HISTORY OF THE PROCEEDING

In their briefs in opposition, the Federal Respondents and Respondent, American Broadcasting Companies, Inc., seek to confuse the real issue raised in this Court

with the substantive issues presented to the Eighth Circuit but never reached by that court. To this end, the history of the Hubbard/ABC controversy is outlined in considerable detail, and the allegation is made that the issue raised herein would affect only Stations KOB and WABC.

Such an argument is completely erroneous. The important procedural issue in this case was raised for the first time by an untimely motion to dismiss filed by the Federal Communications Commission in the Eighth Circuit. The motion had no relationship to the merits of the KOB/WABC controversy and its resolution is of vital importance to all litigants seeking review under the provisions of Section 402 of the Communications Act of 1934, as amended.

THE ISSUE RAISED HEREIN RESULTS FROM THE CONFUSION CREATED BY CONFLICTING DECISIONS OF THE LOWER COURTS

Petitioner has pointed out the fact that the confusion caused by the lower courts' interpretation of Section 402(a) is depriving United States citizens of the rights guaranteed by Congress. To protect themselves, litigants have time and time again given up their right to appeal to the circuit covering their residence or principal office of business. The fact that many parties have decided to proceed under both Sections 402(a) and 402(b) in the United States Court of Appeals for the District of Columbia demonstrates the confusion created by the conflicting decisions of the lower courts. The Commission, itself, recently withdrew a "Motion to Dismiss" three petitions for review filed in the United States Court of Appeals for the Tenth Circuit. The reason for the change of heart was stated as follows:

> "The Commission's motion [to dismiss] urged dismissal on the basis of a legal argument *on which the agency has not firmly adopted a consistent and uniform position.*" (Emphasis supplied) (See Appendix at 17a).

This confusing and vacillating position was echoed in the instant case by the respondent United States, which did not join in the Commission's jurisdictional argument before the Eighth Circuit.[1]

This Court in 1940 and 1942 attempted to clear up the problems caused by the lower courts' conflicting interpretation of the meaning of Section 402(b) and stated that the provisions of that section should be strictly construed. In 1951, Congress amended the statute seeking to clarify its intent. However, both efforts failed and it is imperative that this Court accept the petition and resolve the matter once and for all.

The continued confusion involving the meaning of Section 402 can best be illustrated by decisions of the United States Court of Appeals for the District of Columbia Circuit. In *Functional Music, Inc. v. FCC*, 274 F.2d 543, 544 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), the court noted that Functional Music proceeded under 402(a) and 402(b) because of doubt as to which method of review was authorized. In holding that Section 402(b) was applicable, the Court stated:

> "Sections 402(a) and 402(b) of the Communications Act, under which these review proceedings have been initiated, are by definition mutually exclusive. The proper delineation of these two

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[1] Respondent United States again takes no position on the jurisdictional issue. (Memorandum for Federal Respondents, page 3, footnote 2.)

provisions has been a source of considerable difficulty to litigants in the past." (Footnotes omitted).

Id. at 547.

In 1963, the same court in *Rhode Island Television Corporation v. FCC*, 320 F.2d 762 (D.C. Cir. 1963), stated:

> "In seeking review under both §§ 402(a) and 402(b) of Communications Act, it would appear appellants acted in an abundance of caution to be certain that review would be available under one or the other of the two sections cited. However, these sections 'are by definition mutually exclusive' paths of judicial review and a given order may not be reviewed in two separate cases."

Id. at 766.

In the *Rhode Island* case both a petition for rulemaking and an application were filed with the Commission as was done in the instant case. Upon denial of both the application and the petition, review was sought under Sections 402(a) and 402(b). Judge Burger, speaking for the court, held that the petition for rulemaking could be reviewed under Section 402(a), stating:[2]

> "The Commission's order of July 31, 1962, in exercise of its licensing functions is reviewable under Section 402(b) of the Act in Case No. 17255. The Commission's order of July 30 denying the petition for rulemaking is reviewable under Section 402(a) of the Act in Case No. 17256." (Footnotes omitted).

Id.

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[2] See also, *Mackey v. United States*, 255 F.2d 898 (D.C. Cir. 1958), where the denial of a petition for rulemaking to amend the table of television assignments to shift Channel 3 from Philadelphia to Atlantic City was reviewed under Section 402(a).

Thus the ruling in the *Rhode Island* case is clearly in conflict with that of the Eighth Circuit which held that Petitioner's filing of both a petition for rulemaking and an application for a construction permit created a "package" of applications reviewable only under Section 402(b).

Respondents also contend that the "package" of applications is unlikely to recur, again basing this allegation on the erroneous argument that the jurisdictional issue is related to the past history of the case. The fact is that the challenged action occurs regularly since most petitions for rulemaking are accompanied by or will be followed by an application. Thus, the error of relating petitions for rulemaking to the applications that will be filed to accomplish the ultimate aim of the rulemaking petition is completely contrary to the intent of Congress. The radio licensing power, which is reviewable under Section 402(b), does not include and was never intended by Congress to include petitions designed to make changes in the Commission's frequency allocation plans.

CONCLUSION

It is submitted that the facts and legal precedent cited in the instant petition demonstrate that the issue raised herein presents an important question of law which requires review by this Court. The issue is ripe for resolution by this Court so that the procedural rights of United States citizens, granted by Congress, will be fully protected.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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May 24, 1982

VIA FEDERAL EXPRESS

Robert D. St. Vrain, Clerk
United States Court of Appeals
for the Eighth Circuit
Room 511, U.S. Court and Custom House
St. Louis, Missouri 53101

Re: *Hubbard Broadcasting, Inc. v. Federal Communications Commission*, Case No. 81-2295 (8th Cir., filed November 24, 1981).

Dear Mr. St. Vrain:

On behalf of Hubbard Broadcasting, Inc., petitioner in the above-referenced appeal, and pursuant to *Fed. R. App. P.* 28(j), enclosed are copies of two documents filed by the Federal Communications Commission in a pending appeal in the United States Court of Appeals for the Tenth Circuit, *Springfield Television of Utah, Inc. v. Federal Communications Commission*, Case No. 80-2028 (10th Cir.), which documents Hubbard believes are relevant to the jurisdictional argument raised by the Commission in the instant case. *See Brief for Respondent* at 13-18. The first of these documents is a "Motion to Dismiss," filed May 5, 1981, and the second, a "Consent Motion for Leave to Withdraw 'Motion to Dismiss,'" filed June 19, 1981. Both of these documents recently came to the attention of counsel for Hubbard.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,

/s/ Robert L. Pettit

RLP/aw
Enclosure

cc: C. Grey Pash, Esquire
Robert B. Nicholson, Esquire
James A. McKenna, Jr., Esquire
Clarence V. McKee, Esquire

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Springfield Television of Utah, Inc.,
Petitioner,

v.

Federal Communications Commission and United States of America,
Respondents,

Case No. 80-2028

Storer Broadcasting Company,
Petitioner,

v.

Federal Communications Commission and United States of America,
Respondents,

Case No. 81-1475

WIIC-TV Corporation and Cox Broadcasting Corporation,
Petitioners,

v.

Federal Communications Commission and United States of America,
Respondents.

Case No. 81-1370

MOTION TO DISMISS

The Federal Communications Commission respectfully asks the Court to dismiss the captioned petitions for review, filed under section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a),[1] for lack of

[1] The text of section 402(a) and (b) is appended hereto as Attachment A.

subject matter jurisdiction. Section 402(b) of that statute, 47 U.S.C. § 402(b), vests exclusive jurisdiction over appeals from FCC radio and television licensing decisions in the United States Court of Appeals for the District of Columbia Circuit. The agency order here challenged is intimately associated with the FCC's radio licensing power and under existing precedent is appealable only to the D.C. Circuit under section 402(b).[2]

BACKGROUND

The FCC allots television stations nationwide according to an allocation scheme established in its Table of Allotments (hereinafter Table).[3] That Table assigns television channels to communities throughout the United States with two main goals in mind: to ensure the most efficient technical use of the limited number of available television channels, and to promote a fair distribution of channels nationwide.[4] The Table is based on a system of minimum mileage separations between stations. These separations, together with limitations on power output and antenna height, reduce interference among stations to acceptable levels.

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[2] Dismissal will not preclude petitioners from obtaining judicial review. A petition for reconsideration of the challenged order is presently pending before the FCC. The parties will have thirty days after the agency gives public notice of its action on that petition to appeal the underlying decision. *See* 47 U.S.C. § 405.

[3] The Table of Allotments is found in Section 73.606 of the Commission's rules. *See* 47 C.F.R. § 73.606. Historically, it has been called the Table of Assignments. The Commission is now referring to it as the Table of Allotments in accord with terminology used in the International Radio Regulations.

[4] The Table was devised in 1952. *Sixth Report and Order*, 41 FCC 148 (1952).

An individual interested in applying for a new television station must do three things: (1) find an allocated but unused channel in the Table or file a petition to amend the Table (i.e. to add a new channel) if one is not available;[5] (2) file an application for a permit to construct the television station in question; and (3) apply for a license to operate the station. Ordinarily, a new VHF channel can be added to the Table of Allotments only if it conforms to the mileage separation requirements specified in the FCC's rules.[6] If the channel sought is closer to an allocated channel than the rules permit, the FCC would have to grant a waiver of the rules.

For some time, parties have asked the FCC to waive the mileage separation rules to allow operation of "VHF drop-ins" in selected cities.[7] (A VHF drop-in is a new, short-spaced very high frequency television channel.) The September 9, 1980 order being appealed here waived minimum mileage separation rules and authorized VHF drop-ins in four cities.[8] The effect of the order was

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[5] Parties interested in operating short-spaced VHF television stations in Johnstown, Pennsylvania and Knoxville, Tennessee took this first step some time ago by filing petitions to amend the Table of Allotments so as to add channels in those cities. The FCC consolidated those petitions with the proceeding at issue in this case. *See* note 8, *infra*, 63 FCC 2d at 843-44.

[6] Standard mileage separations are set forth in 47 C.F.R. § 73.610.

[7] *See Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 52 FCC 2d 618 (1975) (Notice of Inquiry).

[8] *See VHF Television Top 100 Markets*, 81 FCC 2d 233 (1980), *petitions for recon. pending*. The underlying Notice of Proposed Rulemaking was issued in 1977. *See Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 FCC 2d 840 (1977).

to allow parties to apply for new television stations in Charleston, West Virginia, Johnstown, Pennsylvania, Salt Lake City, Utah and Knoxville, Tennessee. If that order is judicially affirmed, the FCC can proceed to grant applications for construction permits to build—and ultimately licenses to operate—television stations on these four newly assigned frequencies. Both practically and legally, then, the order being challenged here is inextricably bound up with the process by which short-spaced television stations can be licensed in these four cities.

After the FCC adopted its September 9 order, Springfield Television of Utah, Inc. filed a petition for review with this Court; Storer Broadcasting Co. filed a petition to review the same order in the Sixth Circuit; and a similar petition was lodged in the Third Circuit by WIIC-TV Corp. The latter two cases have since been transferred to this Circuit.

ARGUMENT

Sections 402(a) and (b) of the Communications Act establish two paths for judicial review of Commission orders. Section 402(b) provides that review of orders in eight enumerated situations—all involving the FCC's licensing powers—may be had only in the D.C. Circuit. Section 402(a), a "residual" provision,[9] authorizes review of any order not within section 402(b) in the D.C. Circuit or the circuit in which the petitioner "resides or has its principal office."[10] The two sections are "mutually exclusive;"[11] therefore, this Court has juris-

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[9] *See WHDH, Inc. v. FCC*, 457 F.2d 559, 560 (1st Cir. 1972).

[10] 28 U.S.C. § 2345. Petitions for review under section 402(a) are governed by the requirements of 28 U.S.C. §§ 2341-49.

[11] *See, e.g., Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963).

diction in this case "only if § 402(b) does *not* apply, such matters having been exclusively assigned to the Court of Appeals for the District of Columbia Circuit."[12]

The FCC submits that this case is within the ambit of section 402(b), and that the D.C. Circuit alone has jurisdiction to entertain an appeal from the order which allocated one additional, short-spaced VHF station to each of four cities. Both the legislative history and judicial precedent construing section 402(b) support that view.

Until 1952, jurisdiction to review five types of orders was vested exclusively in the D.C. Circuit under 402(b): orders granting or denying applications for radio station construction permits, licenses, license renewals, license modifications, and orders suspending radio operator licenses.[13] After repeated litigation over the scope and meaning of section 402[14] and several years of congressional attempts to revise it, Congress amended the

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[12] *WHDH, Inc. v. FCC, supra,* 457 F.2d at 560-61 (emphasis in original).

[13] *See* Communications Act of 1934, Ch. 652, § 402, 48 Stat. 1093 (1934), as amended May 20, 1937, Ch. 229, §§ 11-13, 50 Stat. 197.

[14] *See, e.g., Federal Communications Commission v. Columbia Broadcasting System of California, Inc.,* 311 U.S. 132 (1940). The Senate Report explained:

> Under present law, confusion and controversy have arisen concerning what decisions and orders of the Commission might become . . . subject to judicial review and in what court. This has been carried to the point where the time and effort of both litigants and courts have been too much taken up with jurisdictional problems rather than with the merits of particular cases. Enactment of this subsection is designed to obviate this difficulty.

S. Rep. No. 44, 82nd Cong., 1st Sess. 11 (1951).

section in 1952, broadening the range of orders appealable thereunder. It is evident from the legislative history that section 402(b) was amended to

> make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the D.C. Circuit].[15]

Consistent with this legislative purpose, the courts have not woodenly restricted 402(b) appeals to the enumerated categories of cases. Instead, they have required orders to be appealed under that section which bear "close functional similarity" to orders specifically appealable under 402(b),[16] or which are "ancillary" to,[17] "in aid of",[18] or "intimately associated with"[19] the

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[15] S. Rep. No. 44, 82nd Cong., 1st Sess. 11 (1951). Senator White, co-sponsor of an earlier bill that served as the basis of the 1952 amendment to section 402(b) stated:

> [P]aragraph (a) of this section as it now stands relates to those orders of the Commission entered in matters involving common carriers and certain other orders relating to radio broadcast stations not now appealable to the [D.C. Circuit] under paragraph (b) of section 402. Under the proposed amendment, all orders entered by the Commission in the performance of its licensing functions would be appealable under paragraph (b) . . .

89 Cong. Rec. 1469, 1471 (Mar. 2, 1943) (remarks of Senator White on S. 814). *Accord* S. Rep. No. 1567, 80th Cong., 2nd Sess. 19 (1948); S. Rep. No. 741, 81st Cong., 1st Sess. 15 (1949).

[16] *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955) (order denying protest to grant of competitor's application to change frequency and power of broadcast station).

[17] *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959); *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962) (order denying petition to stay or revoke construction permit).

[18] *Cook, Inc. v. United States*, 394 F.2d 84, 87 (7th Cir. 1968) (order returning radio license applications as late filed).

[19] *WHDH, Inc. v. United States*, 457 F.2d 559, 561 (1st Cir. 1972) (order granting program test authority).

exercise of the FCC's licensing power. In resolving jurisdictional questions, courts have looked to "the substance of what the Commission has purported to do and has done." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942).

The FCC's order in this case was the first of three principal steps to licensing new VHF stations in four specific cities—Knoxville, Johnstown, Salt Lake City and Charleston. The waivers lifted an otherwise insurmountable barrier to broadcast operation, making it possible for parties to file construction permit applications. In fact, several applications have been filed since the order's release, and others are on their way. Without question, this Commission order is "ancillary" to, and "intimately associated with" the FCC's licensing power.[20]

The fact that the FCC's action was accomplished by rulemaking does not require a contrary result. Petitions which ask for amendment of the Table of Allotments are considered in a rulemaking context because the Table has been incorporated into the FCC's rules. (5 U.S.C. § 553 requires most rule changes to be made by rulemaking.) In reality, such petitions are more nearly analogous to a licensing proceeding, since they typically affect a limited number of parties—often only one. AM channel assignments, for example, are made in individual adjudications rather than by rulemaking.[21]

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[20] The practical import of the FCC's action is amply illustrated by these three lawsuits by existing television licensees, which maintain they will be economically or otherwise injured by the FCC's authorization of an additional VHF television station in the vicinity of their operation. *See* Springfield Television Docketing Statement at ¶ 1; WIIC-TV Corp. Petition for Review at 3; Storer Broadcasting Co. Petition for Review at 2. *Cf. Metropolitan Television Co. v. United States, supra* note 16.

[21] That is so because the AM allotment scheme, unlike FM and television, is not spelled out in the FCC's rules.

Previous case law lends support to the FCC's position. For example, in *Kessler v. FCC*, the court decided that an FCC order establishing a freeze on the filing of certain AM license applications—which resulted in the return of appellants' applications—effectively denied those applications, and thus judicial review of the FCC's actions was proper only under section 402(b).[22] And in *Cook, Inc. v. United States, supra*, the court dismissed the petitioner's challenge to an FCC order setting a cut-off for the filing of certain applications, finding the Commission's refusal to consider petitioner's late-filed applications to be "in aid of and within the exercise of the Commission's licensing power,"[23]—even though the specific order challenged was not listed in section 402(b). The critical fact in both *Kessler* and *Cook* was that the action challenged regulated the appellants' ability to file license applications.[24] Like the orders in *Kessler* and *Cook*, the order petitioners would have this court review is "ancillary to" and "intimately associated with" the FCC's radio-licensing powers, and is not appealable under section 402(a).[25]

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[22] 326 F.2d 673, 679 and n.4 (D.C. Cir. 1963).

[23] 394 F.2d at 87.

[24] In this case, applicants in the four cities would be unable to apply for construction permits and licenses but for the new allocations. As we have pointed out, petitions for allocations in Johnstown and Knoxville, filed as the first step toward licensing in those cities, provided part of the impetus for the proceeding that led to the FCC's allocation decision. *See* note 5, *supra*.

[25] The fact that the parties in *Kessler* and *Cook* submitted applications to the Commission cannot provide any meaningful distinction between those cases and the instant appeal. Otherwise parties could create 402(b) jurisdiction to review an FCC order simply by filing an application in violation of the order. We respectfully submit that Congress intended the nature of the agency's action, not the context in which it occurs, to be dispositive.

CONCLUSION

This court should dismiss these three petitions for review for lack of jurisdiction under section 402(a). Dismissal will not deprive petitioners of an opportunity for judicial review. *See* note 2 *supra*.

Respectfully submitted,

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May 5, 1981

ATTACHMENT A

PROCEEDINGS TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ORDERS OF THE COMMISSION

SEC. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals

for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

CERTIFICATE OF SERVICE

I, Lorraine J. Thomas, hereby certify that the foregoing "Motion to Dismiss" was served this 5th day of

May, 1981, by mailing true copies thereof, postage pre-paid, to the following persons at the addresses below:

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/s/ Lorraine J. Thomas

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Springfield Television of Utah, Inc., *Petitioner,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents,*	**Case No. 80-2028**
Storer Broadcasting Company, *Petitioner,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents,*	**Case No. 81-1475**
WIIC-TV Corporation and Cox Broadcasting Corporation, *Petitioners,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents.*	**Case No. 81-1370**

CONSENT MOTION FOR LEAVE TO WITHDRAW "MOTION TO DISMISS"

The Federal Communications Commission respectfully asks the Court's leave to withdraw its "Motion to

Dismiss" the captioned petitions for review. The Commission's motion urged dismissal on the basis of a legal argument on which the agency has not firmly adopted a consistent and uniform position. For that reason, we respectfully urge the Court not to rule on the motion but to permit the Commission to withdraw it. We regret any inconvenience our motion may have caused the Court and counsel for other parties. Counsel for petitioners in all three captioned cases consent to withdrawal of motion to dismiss.

Respectfully submitted,

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